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No. _____

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In The

Supreme Court of the United States

October Term, 1990

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the position taken by the United States Government in a condemnation action was "substantially justified" under the Equal Access to Justice Act simply by the Government's use of an "experienced, qualified appraiser," despite the failure of the United States Government: to base its position upon "actual comparable parcels;" to demonstrate that the parcels selected were comparable; and to use a neutral and impartial expert?

2. Whether, in order to prevail in an action for attorneys' fees and expenses under the Equal Access to Justice Act, a prevailing party need show that the United States Government acted in "bad faith" rather than showing that the United States Government was "unreasonable?"

LIST OF PARTIES

Francis J. Bradac and Elizabeth M. Bradac are private citizens now living in St. Paul, Minnesota. The Bradacs were Defendants in the United States District Court for the Western District of Wisconsin, in a condemnation action brought by the United States Government, and were appellants in the United States Court of Appeals for the Seventh Circuit.

The National Park Service of the Department of the Interior brought the condemnation action against the Bradacs.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the opinion reported as *United States of America v. Bradac*, ___ F.2d ___ (7th Cir. 1990), appearing at pages App. 1 - App. 11 of the Appendix. The District Court's Memorandum and Order, *United States of America v. 89.5 Acres of Land*, No. ___-___ (filed September 1, 1987), appears at pages App. 13 - App. 20 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered judgment against the Petitioners on August 15, 1990. App. at 1. The Petitioners' request for a rehearing was denied on October 4, 1990. App. at 22.

This Honorable Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

Facts of the Case

The Saint Croix River flows through eastern Minnesota and northwestern Wisconsin where it merges with the Mississippi River near Prescott, Wisconsin. Approximately 30 miles northeast of Saint Paul, Minnesota, in Polk County, Wisconsin, was the riverfront property of Francis J. Bradac and Elizabeth M. Bradac (hereinafter "the Bradacs").

Since the early 1970's the National Park Service has been engaged in acquiring property along the river through the use of its eminent domain powers for preservation in the Lower Saint Croix National Scenic Riverway Project. One of the numerous properties condemned by the National Park Service was 139.5 acres belonging to the Bradacs.[1]

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[1] Of the 139.5 acres, 89.5 acres were to be conveyed in fee simple to the U.S. Government. The remaining 50 acres were to be constrained by a "scenic easement."

The Bradacs consistently and – unlike other property owners along the Saint Croix – persistently disagreed with the National Park Service's determination of the value of the Bradacs' property. The Bradacs asserted that the value of the property should be determined by using a "developmental appraisal approach," whereas the National Park Service claimed the proper method was the "market appraisal approach" – that is, the comparison of similar property. Despite its assertion that the proper method was the "market appraisal approach," the National Park Service never did compare similar property in the same locale as the Bradacs' property.

Two years before trial the National Park Service asserted that the Bradacs' property was worth $41,000. A few weeks prior to trial the National Park Service reduced its appraisal by more than half – to $19,000. On February 9, 1987, the Bradacs offered to settle for $100,000. On February 18, 1987, the National Park Service counter-offered with $90,000. However, by this time the Bradacs had obtained an independent appraisal indicating that the value of the property for condemnation purposes was $155,000. The Bradacs rejected the counter-offer of the National Park Service. A one-day trial was held on February 27, 1987, at which the jury returned a verdict for the Bradacs of $170,000. The National Park Service has paid that judgment.

Proceedings in the Case

Subsequently, the Bradacs requested that their attorneys' fees and expenses be paid by the United States Government under the Equal Access to Justice Act

("EAJA").[2] That application was denied by the trial court. On August 15, 1990, the Bradacs' appeal to the United States Court of Appeals for the Seventh Circuit was denied by a two to one ruling.

The majority of the Seventh Circuit's panel held that the district court had not abused its discretion by concluding that the position taken by the U.S. Government was "substantially justified" because the appraiser used by the U.S. Government was an "experienced, qualified appraiser."[3] However, the majority did express concern regarding the manner in which the appraisal was determined:

> Although we are puzzled that the Government's appraisal did not use actual comparable parcels from the St. Croix area, there has been no showing of bad faith on behalf of the government.[4]

The dissent, on the other hand, found that the selection of an experienced, qualified appraiser did not answer the inquiry into whether or not the Government's position was "substantially justified."[5] The dissent also referenced the Bradacs' "lengthy statement of alleged facts supporting their position that the Government consistently engaged in conduct amounting to bad faith in

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[2] 28 U.S.C. § 2412(d)(1)(A). In their efforts to recover attorneys' fees and expenses, the Bradacs proceeded *pro se*.

[3] App. at 9.

[4] App. at 8.

[5] App. at 10.

negotiations."[6] Concluding that "the Bradacs simply have not had their day in court on the issue of bad faith," Senior Circuit Judge Pell discussed the factual record in the case: "As far as I can determine from the record, very little, if any, of this factual matter was material to, or brought out, in the one-day jury trial on values."[7]

The Bradacs' motion for rehearing was denied on October 4, 1990.[8]

REASONS FOR GRANTING THE *WRIT*

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Honorable Court.

The United States Government has embarked recently upon an aggressive land acquisition program. In his first State of the Union Address, President Bush announced his desire to increase the National Park Service land acquisition budget from zero to $200 million a year. During Fiscal Year 1990, the National Park Service land acquisition budget was $88.556 million. For Fiscal Year 1991, the National Park Service land acquisition budget is $137.5 million, a 55% increase. In addition, the U.S. Fish and Wildlife Service land acquisition budget has gone from $66.99 million in Fiscal Year 1990 to $99 million in Fiscal Year 1991, nearly a 47% increase.

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[6] *Id.*

[7] App. at 10-11.

[8] App. at 22.

Increasing interest by the current Administration in the acquisition of lands, to provide for the protection of certain environmental values, guarantees that more and more private land will be acquired by federal agencies. For example, President Bush has announced a national "no net loss of wetlands" policy, under which "wetlands" will likely be acquired. In addition, the Endangered Species Act, 16 U.S.C. § 1534, permits the acquisition of private lands to protect "endangered" species.

As well, the President has recently signed into law Public Law 101-628, which, among other provisions, requires the National Park Service to conduct a study of park boundaries. The National Park Service is to issue a report containing an identification of lands for federal acquisition. It is highly likely that increased land acquisitions will result from this study and report.

These new land acquisitions will take place under circumstances similar to those which occurred in the case of Francis J. and Elizabeth M. Bradac. In other words, the National Park Service (or U.S. Fish and Wildlife Service, or other agency) will condemn the property and then the federal agency will offer the former property owner a price for his or her property. If the landowner disagrees with the price offered by the U.S. Government, the landowner's only recourse is to litigate the issue, often at a substantial cost given the vast and nearly unlimited resources of the U.S. Government. Yet even if the landowner prevails in court and obtains the price which the landowner thought was the fair price for his or her property, under the holding of the Seventh Circuit Court of Appeals, that price will be reduced by the attorneys' fees

and other expenses which the landowner incurred fighting the U.S. Government.

Under the holding of the Seventh Circuit Court of Appeals, the offer made by the U.S. Government need only be based upon an appraisal made by an "experienced, qualified appraiser."[9] The appraisal need not have been done in the proper manner – since in this case, for example, no comparable properties were compared – only that the contractor used by the federal agency be an "experienced, qualified appraiser."

The holding of the Seventh Circuit Court of Appeals, if applied nationally by the United States Government, will have disastrous implications for the private landowner. For the rare, courageous landowner who is willing to contest, in court, the offer made by the federal agency, victory will be pyrrhic, since, under the ruling of the Seventh Circuit, attorneys' fees and expenses will not be reimbursed by the United States Government. If the instant decision stands, the National Park Service will be able to advise property owners that they had better accept the U.S. Government's first offer since it was prepared by an "experienced, qualified appraiser," and since any higher award the property owner might get after a long court battle will be decreased by the costs of attorneys' fees and expenses incurred by the landowner.

As a result, the petition should be granted.[10]

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[9] App. at 9.

[10] The exercise of jurisdiction by this Honorable Court is further merited in light of 28 U.S.C. § 2106 which authorizes

(Continued on following page)

B. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And The Decision Rendered By This Honorable Court.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), this Honorable Court addressed the meaning of the phrase "substantially justified" as found in the Equal Access to Justice Act.[11] The Court concluded that the phrase means " 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person."[12] The Court went on to explain:

> That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. (Citations omitted.) To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government

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this Honorable Court to correct decisions "as may be just under the circumstances."

[11] The Equal Access to Justice Act provides in pertinent part:

> Except as specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil proceeding . . . unless the court finds that the position of the United States was *substantially justified* or that special circumstances make the award unjust.

28 U.S.C. § 2412(d)(1)(A). (Emphasis added.)

[12] 487 U.S. at 564, quoting Webster's New International Dictionary 2514 (2d ed. 1945).

> litigation of which a reasonable person would approve.

487 U.S. at 566.

Notwithstanding the pronouncement of this Honorable Court regarding the proper interpretation of the phrase "substantially justified," the Seventh Circuit – while asserting that it was applying a rule adopted by another circuit, that is, that of the Eighth Circuit – deviated from even that standard and further deviated from the holding of this Honorable Court.

In upholding the decision of the U.S. District Court to deny the Bradacs recovery under the Equal Access to Justice Act, the Seventh Circuit stated that it could find no basis for concluding that the U.S. Government had acted in "bad faith." In so doing the Seventh Circuit placed the burden of proof upon the Bradacs to meet a standard which goes far beyond the requirements of the EAJA that the position of the U.S. Government have a "reasonable basis both in law and fact." 487 U.S. at 565.

To ask that the Bradacs show, not that the position taken by the U.S. Government did not have a "reasonable basis both in law and fact," but that the position was one which demonstrated "bad faith" totally distorts what this Honorable Court has declared to be the meaning of the "substantially justified" language of the EAJA.[13] "Bad

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[13] Notwithstanding the Seventh Circuit's conclusion that "there has been no showing of bad faith on behalf of the government" (App. at 8), the District Court's Memorandum and Order contains only one sentence regarding the government's behavior: "the government did not act in bad faith in relying on the appraiser's valuation." App. at 20.

(Continued on following page)

faith" is not the same as "unreasonable," yet the two are made the same by the Seventh Circuit in the decision below.

"Bad faith" is defined as:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary, 72-73 (5th Abridged ed. 1983).

As this Honorable Court held in *Pierce v. Underwood*:

> To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

487 U.S. at 566.

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Thus the District Court did not demand that the U.S. Government demonstrate that its position was "substantially justified," but simply concluded that "the government did not act in bad faith in relying on the appraiser's valuation." App. at 20. As a result, the District Court markedly changed the test under the EAJA from one of "reasonableness" to one which requires an absence of "bad faith."

Thus while this Honorable Court has held that the U.S. Government does not meet its burden of showing that its position was "substantially justified" merely by avoiding sanctions under Fed.R.Civ.Pro. 11, the Seventh Circuit has held that the U.S. Government has met that burden merely by asserting that "bad faith" was not shown.

Thus the decision of the Seventh Circuit is in direct, intolerable and irreconcilable conflict with the decision of this Honorable Court in *Pierce v. Underwood*. As a result, the petition should be granted. In the alternative, in view of the conflict of the decision below with a decision of this Honorable Court, the Court may wish to consider summary reversal.[14]

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[14] Such action is particularly justified by the dissent filed below by Senior Circuit Judge Pell:

> The landowners for now have set forth a lengthy statement of alleged facts supporting their position that the Government consistently engaged in conduct amounting to bad faith in negotiations. As a result, substantial additional attorney's fees had to be incurred to take this case through trial. As far as I can determine from the record, very little, if any, of this factual matter was material to, or brought out, in the one-day jury trial on values.
>
> I dissent because the Bradacs simply have not had their day in court on the issue of bad faith and I would hold that we should vacate the ruling below and remand the case for an evidentiary hearing on the unresolved issue of bad faith.

App. 10-11.

C. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And The Decision Of The Eighth Circuit Court Of Appeals Upon Which That Decision Is Based.

In its decision the Seventh Circuit asserted that it adopted the standard enunciated by the Eighth Circuit Court of Appeals in *United States v. 1,378.65 Acres (Vernon County)*, 794 F.2d 1313, 1319 (8th Cir. 1986) (the Government's position is substantially justified "when . . . [it] selects experienced, qualified, competent appraisers, and consistently relies on their valuations . . . without any evidence of bad faith. . . . "). Yet even a cursory reading of *Vernon County* reveals that the Seventh Circuit, while embracing the rule set forth by the Eighth Circuit, abandoned the factual predicate for the decision of the Eighth Circuit in *Vernon County*.

The majority in the Seventh Circuit's decision admitted that the appraiser hired by the U.S. Government had not used "comparable parcels" from the Saint Croix River Valley, "so we do not know on what basis the Bradacs' land was compared:" "[W]e are puzzled that the Government's appraisal did not use actual comparable parcels from the St. Croix area. . . . "[15] Under the decision of the Eighth Circuit in *Vernon County*, the failure of the U.S. Government's appraisal to use actual comparable parcels from the St. Croix area would have doomed any attempt by the U.S. Government to assert that its position was "substantially justified," that is, that it had a "reasonable basis both in law and fact." For in *Vernon County* it was the use of comparable properties that permitted the

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[15] App. at 8.

Eighth Circuit to conclude that the U.S. Government's position was "substantially justified:"

> [The Government's appraiser and the landowner's appraiser] used similar appraisal methods. To evaluate the loss in value of the land caused by the greater risk of flooding following construction of the dam, they calculated separately the value of the land without and with the risk of flooding. To arrive at each value, *they compared the prices similar plots of land had brought at sale,* adjusting these to take account of the advantages and disadvantages of the land in question. The [Fed.R.Civ.P. 71A(h)] Commission also adopted the same method.[16]

The Seventh Circuit, by ignoring the failure of the U.S. Government to "[compare] the prices similar plots of land had brought at sale," deviated sharply from the decision of the Eighth Circuit in *Vernon County*. As a result, the decision of the Seventh Circuit results in a true, direct, intolerable and irreconcilable conflict between the Seventh Circuit and the Eighth Circuit. It is a conflict which must be resolved by this Honorable Court. As a result, the petition should be granted.

In the alternative, particularly in light both of the failure of the majority of the Seventh Circuit to rule in a manner consistent with the decision of the Eighth Circuit and the assertion of the dissent that "the Bradacs simply have not had their day in court on the issue of bad

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[16] 794 F.2d at 1315. (Emphasis added.) The Eighth Circuit took pains to note that the Government's appraiser was a member of the American Institute of Real Estate Appraisers and the recipient of the Institute's highest designation, the MAI. *Id.*, at 1314.

faith,"[17] this Honorable Court should grant *certiorari*, vacate the judgment below and remand the case to the lower court for reconsideration in light of the holding of this Honorable Court in *Pierce v. Underwood*. This is particularly appropriate given the absence of any factual determination regarding the manner in which the U.S. Government determined the value of the Bradacs' property.

D. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts Of Appeal.

Not only is the decision of the Seventh Circuit in conflict with the decision of the Eighth Circuit – as demonstrated above – it is in direct, intolerable and irreconcilable conflict with the holdings of at least two other circuits: the Tenth Circuit in *United States v. Charles Byurman Land & Cattle Co., et al.*, 836 F.2d 480, 485 (10th Cir. 1987) (test of substantial justification should be based upon "[t]he totality of the circumstances as reflected by the record before the court"); and the Eleventh Circuit in *United States v. 640 Acres (Dade County)*, 756 F.2d 842, 850 (11th Cir. 1985) (test of substantial justification involves weighing the price per acre offered by the government as comparable to awards on similar tracts; finding whether the appraisal was made by a neutral and impartial expert or one regularly employed by the government; whether sound comparables were used in the appraisal; and an

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[17] "As far as I can determine from the record, very little, if any, of this factual matter was material to, or brought out, in the one-day jury trial on values." App. 10.

exploration of the issue of good faith involving government attempts to reconcile the dispute prior to litigation.)[18]

The Seventh Circuit openly admitted that "comparable parcels" were not used by the U.S. Government. As a result, the Seventh Circuit was prevented from engaging in the type of review demanded by the Tenth and Eleventh Circuits, including a weighing of the price per acre offered by the government as compared to awards on similar tracts, as well as a ruling as to whether sound comparables were used in the appraisal. Further, the Seventh Circuit did not find that the appraisal was made by a neutral and impartial expert rather than one regularly employed by the government.

What the Seventh Circuit has done is to permit the U.S. Government to demonstrate that its position was "substantially justified" by the mere assertion that the U.S. Government used the services of an "experienced, qualified appraiser." Under the Seventh Circuit's holding, the failure of that appraiser, in reaching his or her appraisal, to use "comparable parcels," let alone "sound comparables" is irrelevant. In addition, under the Seventh Circuit's holding, the use by the U.S. Government of an appraiser regularly employed by the Government rather than a neutral and impartial expert is also irrelevant.

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[18] The standard of the Tenth Circuit and the Eleventh Circuit appears to be the same, the Eleventh Circuit having more specifically delineated what constitutes the "totality of the circumstances."

The decision of the Seventh Circuit is in direct conflict with the decisions of two other circuits which have addressed this matter, creating a conflict which must be resolved by this Honorable Court. As a result, the petition should be granted.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should issue to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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December 1990

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 88-1019
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS J. BRADAC and
ELIZABETH M. BRADAC,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 86 C 538 – **John C. Shabaz,** *Judge.*

SUBMITTED JULY 31, 1990* – DECIDED AUGUST 15, 1990

Before COFFEY and FLAUM, *Circuit Judges,* and PELL, *Senior Circuit Judge.*

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*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

FLAUM, *Circuit Judge*. The St. Croix River is a picturesque waterway of 164 miles in length that flows steadily through eastern Minnesota and northwestern Wisconsin, eventually merging with the Mississippi River near LaCrosse, Wisconsin. Along its Wisconsin course is Polk County, and the riverfront property of Francis and Elizabeth Bradac (the "Bradacs"). Since the early 1970's, the National Park Service has recognized the uncommon beauty of the St. Croix valley and has been acquiring property along the river through the exercise of eminent domain. Due to these condemnation proceedings, approximately 139.5[1] acres owned by the Bradacs was acquired by the Park Service and is now a portion of the Lower St. Croix National Scenic Riverway Project, a National Park that preserves portions of the St. Croix's path for public enjoyment and recreation.

The Fifth Amendment of the United States Constitution provides that when the government takes private property the landowner must be "justly compensated", but just compensation is an illusive concept. *See, generally, United States v. 0.376 Acres of Land*, 838 F.2d 819, 827 (concurring opinion) (6th Cir. 1988). Occasionally the landowner merely accepts the government's initial valuation of the property and deeds over the land for the

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[1] Of this total acreage, 89.5 acres was to be conveyed in fee simple to the government, and the remaining 50 acres related to a "scenic easement", which apparently prevented the landowner from building any structure which could be viewed from the park lands or cutting standing trees without the express permission of the U.S. Parks Service. Transcript of the testimony of defendants' expert Mr. Peter J. Patchin, redirect examination at p. 81 and recross examination at pages 86-87.

agreed price. More often, a negotiation process ensues which utilizes conflicting land appraisals, eventually culminating in an agreed settlement. Despite protracted discussions, however, the Bradacs and the National Park Service never reached an understanding of the value of the land in question,[2] ultimately resulting in this litigation.

The Bradacs and the government each used distinctly different methods of determining the value of the parcel; the appraiser retained by the Bradacs used a "development appraisal approach" – speculating what the value of the land would be if it were eventually developed. The government's appraiser used the "market appraisal approach" – a method which compares similar property to determine the condemned parcel's value.

For reasons that remain unclear, the government's appraisal did not compare similar property in the St. Croix River valley that was sold voluntarily near the time of the taking. Perhaps the appraiser chose not to; perhaps no privately sold riverfront property existed locally, as it had been or was in the process of being acquired by the government for the National Park. In any event, the figures provided by the party's respective appraisals varied by a wide margin.

The government's appraisal fixed the price at $41,000 approximately two years before trial. This figure was

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[2] For the sake of simplicity, the values expressed for the subject property are referred to as appraised values. In actuality, the values are based on the difference of the value of the land as determined by subtracting the appraised "after taking value" from the appraised "before taking value".

revised prior to trial by their appraiser to $19,000, to reflect his belief that land prices in the area had become depressed since the $41,000 offer was tendered.[3] Prior to trial on February 9, 1987, the Bradacs offered to settle for $100,000. The government counter-offered 9 days later at $90,000, but apparently the Bradacs now wanted $155,000 and the government's counter-offer went unaccepted. Negotiations stalled.

The clerk of the district court[4] held a settlement conference in an attempt to conserve the court's time, but no compromise was reached. The Bradacs eventually produced their own independent appraisal on the eve of trial which set the value at $155,000, using the development appraisal approach. The one-day trial was held on February 27, 1987 and the question of value was put to the jury, which returned a judgment in the amount of $170,000. That judgment has been paid.

The sole issue in this appeal involves whether the district court properly denied the Bradacs request for attorneys fees and costs pursuant to the Equal Access To Justice Act, 28 U.S.C. § 2412 (the Act). The Act provides in pertinent part as follows:

> "Except as otherwise specifically provided by statute, a court *shall award* to a *prevailing*

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[3] The government's appraiser, Mr. Everett Strand, was not allowed to enter the Bradac property prior to October, 1986. The government's prior appraisal was thus apparently done without the benefit of an actual site visit of the specific Bradac property.

[4] The Clerk of the U.S. District Court for the Western District of Wisconsin is also a U.S. Magistrate.

> *party* other than the United States *fees and other expenses, in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil proceeding . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust.*" 28 U.S.C. § 2412(d)(1)(A) (Emphasis supplied).[5]

The appeal requires that we determine, apparently for the first time in this circuit, our standard for "substantial justification" in a condemnation proceeding. When property appraisals differ so widely, and a jury eventually returns a judgment that was significantly closer to the landowner's appraisal than that of the United States, under what circumstances does the government's position (the amount offered the landowner) lack substantial justification and therefore warrant an award of attorney's fees and costs under the Act?

STANDARD OF REVIEW

We review the district court's denial of an award of attorneys fees and costs under an abuse of discretion standard. *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir. 1990). An abuse of discretion is established only where no reasonable man could agree with the district court. *Hough v. Local 134, IBEW*, 867 F.2d 1018, 1022 (7th Cir. 1989) (quoting *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 796 (7th Cir. 1980). An error of law by the district

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[5] The United States has not argued that the Bradacs are not the "prevailing party" in this litigation, or that "special circumstances" exist which would make an award of attorneys fees unjust. Therefore we need not discuss those issues here.

court constitutes an abuse of discretion. *U.S. v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989) (quoting *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n. 2 (7th Cir. 1986). As this court has never specifically addressed the issue of the Act's "substantial justification" language in a condemnation proceeding, the district court was guided by the Eighth Circuit's analysis in *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313 (8th Cir. 1986).

ANALYSIS

I.

Many of our sister circuits have addressed the issue of substantial justification of the United States's [sic] position vis a vis the award of attorneys fees under the Act in eminent domain cases, albeit utilizing somewhat varied approaches and at times achieving different results. *United States v. 312.50 Acres (Prince William County)*, 851 F.2d 117, 119 (4th Cir. 1988) (test of substantial justification "focus[es] upon the relationship between the government's offer, the appraisals, and the valuations established by the government's expert witness during trial, rather than the relationship between the government's offer or deposit and the property owner's counteroffer, if any, or the jury award . . . "); *United States v. 0.376 Acres (Knox County)*, 838 F.2d 819 (6th Cir. 1988) ("the issue of substantial justification is essentially one of reasonableness, as the legislative history shows"); *United States v. 1,378.65 Acres (Vernon County)*, 794 F.2d 1313 (8th Cir. 1986) (analysis employed by Judge Shabaz in this case, and discussed below); *United States v. Charles Gyurman Land & Cattle Co., et al.*, 836 F.2d 480, 485 (10th Cir.

1987) (test of substantial justification should be based upon "[t]he totality of the circumstances as reflected by the record before the court"); *United States v. 640 Acres (Dade County)*, 756 F.2d 842, 850 (11th Cir. 1985) (test of substantial justification involves weighing the price per acre offered by the government as comparable to awards on similar tracts; finding whether the appraisal was made by a neutral and impartial expert or one regularly employed by the government; whether sound comparables were used in the appraisal; and an exploration of the issue of good faith involving government attempts to reconcile the dispute prior to litigation). Since Judge Shabaz utilized the analysis of the Eighth Circuit, we shall first focus on that approach.

II.

In *United States v. 1,378.65 Acres of Land* the Eighth Circuit stated:

> [w]hen in a condemnation action the Government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offers of just compensation, without any evidence of bad faith on its part, its course of conduct is solid, well founded, and clearly reasonable. Its position, therefore, is substantially justified.

Id. at 1319.

Here, the district judge focused on the qualifications of the government's appraiser, Mr. Everett Strand, finding him an "experienced, qualified and competent appraiser." (District Court opinion at 8). The district court found that the government utilized Strand's appraisals

(both the initial appraisal of $41,000 and the revised $19,000 appraisal) in formulating their "just compensation" offer. Further, Strand at both times utilized comparable parcels in his analysis. These comparable parcels, however, were not from St. Croix River valley, so we do now know on what basis the Bradac's land was compared. (*Id.* at 8). We know only that the district court found that Strand "used comparables containing both wooded areas and waterfront property . . . " in his analysis. (*Id.* at 8).

The Bradacs argue that a "developmental approach" should have been utilized by the government's appraiser, not a "market appraisal approach." We disagree. Appellants have offered no legal authority to support this position.

Although we are puzzled that the Government's appraisal did not use actual comparable parcels from the St. Croix area, there has been no showing of bad faith on behalf of the government. Indeed, our review of the record before us shows a history of good faith settlement offers by the United States in this case.

The Fourth Circuit's analysis in *Prince William County* adopted the Eighth Circuit's test in *341.45 Acres of Land, St. Louis City, Minnesota*, 751 F.2d 924, 940-41 (8th Cir. 1984). Although *341.45 Acres* was later vacated without opinion or explanation, 786 F.2d 1168 (8th Cir. 1986), its analysis was later reaffirmed by *United States v. 1,378.65 Acres of Land (Vernon County)*, 794 F.2d at 1319. We agree with the Eighth Circuit's analysis and adopt the substantial justification test of 1,378.65 Acres employed by the district court.

CONCLUSION

We find that the district court did not abuse its discretion when it concluded that the Government selected an experienced, qualified appraiser in Mr. Strand, and that it consistently relied on Strand's appraisals of the Bradacs property in its offers of just compensation. We therefore conclude that the Bradacs were properly denied attorneys fees under the Act.

Finally, one procedural matter must be addressed involving two pending motions before this court. The Bradacs have filed an objection (entitled "Defendants Presentation", filed August 8, 1988) to the Government's citation of additional authority of *United States v. 312.50 Acres (Prince William County)*, which we construe as a motion to strike. The Bradacs have also filed a "Motion to Correct Error" (September 19, 1988), which addresses the developmental vs. market appraisal issue discussed above. The Bradacs object to the representation by the United States that the "[d]istrict court ruled in favor of the U.S. on the issue of valuation," discussed in the response of the United States to the motion to strike additional authority. As we address the totality of the issues on appeal here, both of these motions are hereby denied. The judgment of the district court is therefore

AFFIRMED

PELL, *Senior Circuit Judge*, dissenting.

Finding myself not in agreement with the result reached by the majority in this appeal, I respectfully dissent. Subsequent to the entry of a judgment in the amount of the jury award in this case, the landowners

filed an application for attorneys' fees and costs under the Equal Access to Justice Act. The trial judge denied this motion and this appeal followed. The majority opinion affirms the action of the district court.

Judge Shabaz addressed the issue of the Act's "substantial justification" relying principally on the Eighth Circuit's analysis of the issue in *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313 (8th Cir. 1986). The majority accepts the use of this case and I have no quarrel with its being the guiding star for the disposition here. My objection is to the application of the test in this case. It appears to me that both the district court and this court are placing overemphasis on the selection of an experienced, qualified, and competent appraiser. I have no reason to question the qualifications in this respect of Everett Strand. There is another prong, however, in the Eighth Circuit's analysis and that is that the condemnor, in relying on the qualities of its appraiser, must also have conducted itself "without any evidence of bad faith on its part."

The landowners for now have set forth a lengthy statement of alleged facts supporting their position that the Government consistently engaged in conduct amounting to bad faith in negotiations. As a result, substantial additional attorneys' fees had to be incurred to take this case through trial. As far as I can determine from the record, very little, if any, of this factual matter was material to, or brought out, in the one-day jury trial on values.

I dissent because the Bradacs simply have not had their day in court on the issue of bad faith and I would

hold that we should vacate the ruling below and remand the case for an evidentiary hearing on the unresolved issue of bad faith.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: August 15, 1990

BEFORE: Honorable John L. Coffey, Circuit Judge

Honorable Joel M. Flaum, Circuit Judge

Honorable Wilbur F. Pell, Jr., Senior Circuit Judge

No. 88-1019

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

FRANCIS J. BRADAC and ELIZABETH M. BRADAC,
Defendants – Appellants

Appeal from the United States District Court for the Western District of Wisconsin
No. 86 C 538, Judge John C. Shabaz

This cause came before the Court for decision on the record from the above mentioned district court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, and Bradacs objection which we construe as a motion to strike and the motion to correct error are DENIED, in accordance with the opinion of this Court filed this date.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

89.5 ACRES OF LAND, MORE OR LESS, SITUATED IN POLK COUNTY, STATE OF WISCONSIN, (TRACT 06-168); 50.0 ACRES OF LAND, MORE OR LESS, SITUATED IN POLK COUNTY, STATE OF WISCONSIN, (TRACT 06-169); FRANCIS J. and ELIZABETH M. BRADAC; R.D. ROBINSON; COUNTY TREASURER, COUNTY OF POLK; TOWNSHIP TREASURER, TOWNSHIP OF FARMINGTON,

Defendants.

MEMORANDUM AND ORDER

86-C-538-S

(Filed Sep. 1, 1987)

The plaintiff United States of America commenced condemnation proceedings against land owned by the defendants Francis and Elizabeth Bradac. The Court determined that the plaintiff had the authority to condemn the land and a jury determined the amount of just compensation that the plaintiff had to pay for the land. Defendants are now before the Court asking the Court to award them their attorneys' fees and costs as provided in the Equal Access to Justice Act, 28 U.S.C. § 2412.

FACTS

The United States of America, acting through the National Park Service, attempted to acquire land in furtherance of the administration, protection, and development of the lower St. Croix National Scenic Riverway. The purpose of the Lower St. Croix National Scenic Riverway Project is to protect and preserve the St. Croix Riverway including the natural qualities of the riverway and the surrounding area within the project boundaries. In furtherance of the St. Croix Scenic Riverway, the government has acquired interest in approximately 600 different tracts which border the St. Croix River. Before this action there remained approximately 24 tracts which the government still sought to acquire. Among the tracts sought was the Bradac property.

Defendants Francis and Elizabeth Bradac owned approximately 239.5 acres of property in Polk County, Wisconsin, including parcels 06-168 (approximately 89.5 acres) and 06-169 (approximately 50.0 acres). Tract 06-168 consists primarily of wooded flood plain land as well as a wooded bluff which amounts to approximately 89.5 acres. Tract 06-169 consists primarily of wooded land at the top of a bluff adjoining 100 acres of agricultural land. The specific acreage of the easements sought on 06-169 was approximately 50 acres.

On or about September 16, 1977, the government submitted an offer to the defendants in an amount of $38,000 for the conveyance of a fee interest in 06-168 and of $24,000 for a scenic easement interest in 06-169. The offer of September 1977 was not accepted by the Bradacs. On or about March 14, 1979, the United States submitted

an offer to the defendants in an amount of $83,400 for a fee interest in 06-168 and of $9,600 for a scenic easement in 06-169. That offer was also rejected by the Bradacs. On or about May 6, 1986, the United States submitted an offer to the defendants for $70,000 for a fee interest in 06-168 or $38,500 for a riverfront easement in 06-168 and an offer of $2,500 to the defendants for a scenic easement in 06-168. The May 1986 offer was based upon a two-year-old appraisal done by Everett Strand. The appraisal, based upon the market approach, did not use comparable sales which were located on the St. Croix River. The May 1986 offer was rejected by the Bradacs.

Prior to October of 1986, the defendants had not allowed an appraiser retained by the government to visit the premises for an on-site inspection. In October of 1986, however, the defendants did allow the government's appraiser, Everett Strand, to visit the property in question and inspect the premises for purposes of an appraisal. After this inspection, Strand valued the property before the taking at $126,000 and after the taking at $107,000. Strand claimed that the values were lower than in his earlier appraisal because property values in Polk County, Wisconsin were depressed. The appraisal done by Strand used the market approach but was not based on any comparables located on the St. Croix River. Strand did not use the development cost approach in preparing the appraisals.

Peter Patchin appraised the property for the Bradacs. He used the development cost approach to prepare his appraisal. In his opinion, the value of the property before the taking was approximately $307,000 and the value after the taking was $152,000. The government was not

told about Patchin's appraisal until shortly before the trial.

A trial was held to determine whether the government's taking of the Bradac land was justified, and if so, what was just compensation for the taking. The Court determined that the taking was justified and the jury heard evidence concerning just compensation for the taking of the land. The government and the Bradacs each presented evidence of their appraisals. In addition, Mr. Bradac testified that in his opinion damages were at least $280,000. After hearing this evidence, the jury returned a verdict finding that the damages caused by the taking were in the amount of $170,000 based on a before taking value $307,000 and an after taking value of $137,000.

OPINION

Defendants are now before the Court asking the Court to award them their attorneys' fees and other expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Section 2412(d)(1)(A) provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"Prevailing party" is defined in 28 U.S.C. § 2412(d)(2)(H) as follows:

> "Prevailing party," in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

Defendants contend that they are prevailing parties, that the government's position in the litigation was not substantially justified, and that accordingly, they should be awarded their attorneys' fees under 28 U.S.C. § 2412.

Defendants contend that they are the prevailing party in the compensation portion of the trial. Defendants' contention is based upon the fact that the final judgment was higher than the valuation offered by the Bradac's appraiser. The final judgment was also closer to the value placed on the property by Francis Bradac than it was to the value placed on the property by the government's appraiser at trial. The government contends that the defendants are not the prevailing party because the jury rejected Francis Bradac's testimony and awarded damages which were $100,000 less than defendants wished. The government also argues that the defendants did not prevail because the jury essentially reached a compromise between the government's and the defendants' positions.

The Court believes that under the explicit language of 28 U.S.C. § 2412(d)(2)(H) it is clear that the defendants

are prevailing parties for the compensation portion of the trial. The $170,000 awarded to the plaintiff as compensation for the taking was closer to the $280,000 value as testified by Francis Bradac at trial than it was to the $19,000 value testified to by the government's appraiser at trial. Accordingly, the Court holds that defendants are prevailing parties for the compensation portion of the condemnation trial.

Defendants also contend that the government's position was not substantially justified. Defendants point to the following facts in support of their contention that the government's position was not substantially justified: (1) the government's May 1986 offer of $41,000 was based on an appraisal which was two years old and which used no comparable sales on the St. Croix River; (2) the government at trial offered testimony that damages were only $19,000 based upon a more recent appraisal also which did not use market comparables on the St. Croix riverfront; (3) the government appraiser valued the property before the taking at $126,000, which was even less than the assessed value of $137,000; and (4) the government's appraiser failed to use the development cost approach even though there was a lack of market comparables.

The government contends that its position was substantially justified. In support of its position, the government points to the following facts: (1) Everett Strand is a qualified appraiser who has an extensive background in appraisals; (2) the government's May 1986 offer to the defendants was based upon an earlier appraisal by Strand; (3) Strand conducted an on-site evaluation of the property in October of 1986 after which Strand lowered his valuation of the property based upon the depressed

market conditions in the area; (4) Strand's October 1986 appraisal used comparables which contained wooded areas as well as water front property; (5) Strand did not believe that the market would support the type of development being proposed by the defendants; (6) the government did not have knowledge of the defendants' appraiser's valuations until shortly before trial; and (7) the government's position at trial was based upon Strand's October 1986 appraisal.

In determining whether the government's position was substantially justified, the Court is guided by the Eighth Circuit's opinion in *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313 (8th Cir. 1986). In that case, the Court stated that:

> [w]hen in a condemnation action, the Government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offers of just compensation, without any evidence of bad faith on its part, its course of conduct is solid, well founded, and clearly reasonable. Its position, therefore, is substantially justified.

Id. at 1319.

With this statement in mind, the Court will examine the facts of this case to determine whether the government's position was substantially justified. First, the Court believes that the government's appraiser, Everett Strand, was an experienced, qualified and competent appraiser. Second, the government's position both before and during trial appears to be based upon Strand's appraisals. The government's May 1986 offer to the defendants was allegedly based upon a two-year-old

Strand appraisal. In October of 1986, Strand was finally allowed to make an on-site inspection of the property. Strand determined that the value of the property was less than he had previously determined. The lower property value, according to Strand, was based on the depressed market conditions. In preparing the new appraisal, Strand used comparables containing both wooded areas and waterfront property, but did not use comparables from the St. Croix River. Strand did not use the development approach when preparing his appraisals for the land. Third, the government did not have any knowledge, until shortly before trial, that would indicate it might not be substantially justified in relying on Strand's appraisal. The government was not informed about the results of Patchin's appraisal until shortly before the trial. Furthermore, Patchin's appraisal was based upon the development approach which the government's appraiser reasonably could have rejected based upon his opinion that the market could not support the development proposed by the defendants.

Based upon these facts the Court finds that the government selected an experienced, qualified, competent appraiser to appraise the land, that the government relied on its appraiser's valuations in its offers of just compensation, and that the government did not act in bad faith in relying on the appraiser's valuations. Accordingly, the Court holds that the government's course of conduct was solid, well founded, clearly reasonable and substantially justified.

Since the government's position was substantially justified, defendants are not entitled to recover attorneys'

fees pursuant to 28 U.S.C. § 2412. Defendant's motion for attorneys' fees is therefore denied.

ORDER

IT IS ORDERED that defendants' motion for attorneys' fees is DENIED.

Entered this 28th day of August, 1987.

BY THE COURT:

/s/ John C Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 4, 1990

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILBUR F. PELL, Senior Circuit Judge

United States Of America Plaintiff-Appellee	)	Appeal from the United States District Court for the Western District of Wisconsin No. 86 C 538 Hon. John C. Shabaz, Judge
No. 88-1019	)	
v.	)	
Francis J. Bradac and Elizabeth M. Bradac Defendants-Appellants	)	

ORDER

On consideration of the Motion For Reconsideration filed herein by pro se appellants, the court construes the motion as a petition for rehearing, as a published decision was issued in this case. On September 20, 1990, the Mountain States Legal Foundation filed a "Motion For Leave To File Brief Amicus Curiae In Support of Appellants' Motion For Reconsideration." Although Mountain State's motion was filed after the time for filing a petition for rehearing had expired, and no amicus brief was tendered, the panel has considered the motion.

Accordingly, both the petition for rehearing and the motion for leave to file an amicus brief are hereby denied.[1]

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[1] Judge Pell has voted to grant both the petition for rehearing and the motion for leave to file an amicus brief by the Mountain States Legal Foundation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

89.5 ACRES OF LAND, MORE OR LESS, SITUATED IN POLK COUNTY, STATE OF WISCONSIN, (TRACT 06-168); 50.0 ACRES OF LAND, MORE OR LESS, SITUATED IN POLK COUNTY, STATE OF WISCONSIN, (TRACT 06-169); FRANCIS J. and ELIZABETH M. BRADAC; R.D. ROBINSON; COUNTY TREASURER, COUNTY OF POLK; TOWNSHIP TREASURER, TOWNSHIP OF FARMINGTON,

Defendants.

MEMORANDUM AND ORDER

86-C-538-S

In view of the defendants' motion for reconsideration of this Court's order of August 28, 1987, denying attorneys' fees, the relevant issues must be summarized and concisely stated.

The memorandum submitted on behalf of the defendants Francis J. and Elizabeth M. Bradac on May 28, 1987 in support of attorneys' fees and costs was pursuant to the Equal Access to Justice Act, specifically 28 U.S.C. § 2412(d)(1)(A). Defendants contended that they were the

prevailing parties and that the government's position was not substantially justified.

The Court determined in its order that Mr. and Mrs. Bradac were, indeed, the prevailing parties, but that the position of the government could not be found to be "not substantially justified."

The government offered, in its responsive memorandum, ancient history, prelitigation disputes and unsuccessful negotiations entered into between the parties not related to the defendants' motion. In spite of the attempt by counsel for the Bradacs' in the reply brief to limit the discussion to the issues before the Court, the defendants themselves have now chosen to protract the less-than-relevant debate initiated by the government and perhaps triggered by the Court at paragraph 3 of its memorandum, where it was stated, "prior to 1986 the defendants had not allowed an appraiser retained by the government to visit the premises for an on-site inspection."

Regardless of this catalyst, which may have kept the pot boiling, the Court's decision denying attorneys' fees was based on the government's selection of an experienced appraiser, reliance on the appraiser's valuation in making offers of just compensation, and the lack of bad faith for its reliance thereon.

The Court realizes that Francis J. and Elizabeth M. Bradac were less than satisfied with either the intrusive legislation or the Court's decision which authorized the taking of their lands. Perhaps, spurred on by the government's response, they would prefer to litigate their concerns forever. Unquestionably, they have presented a genuine outpouring of legitimate distaste, which finds a

sympathetic ear in many quarters, for a system allowing this intrusion. We do, however, have a government of laws, rather than of men, and accordingly, as recognized by all parties and the Court, our laws must be obeyed.

The remedial purpose of the EAJA may be found to be best served by considering the totality of the circumstances, prelitigation and during trial, *McQuiston v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983). Further, a Court may award fees where one party has acted in bad faith, vexaciously, [sic] wantonly, or for oppresive [sic] reasons in either the actions which led to the lawsuit or in conduct of the litigation, *Hall v. Cole*, 412 U.S. 1, p.15 (1973).

The facts, however, and the totality of the circumstances do not justify the award requested in this case. Even the government, having initiated this continuing acrimony, now recognizes that the history revisited by the Bradacs is not appropriate. As frustrating as the experiences endured by the defendants may have been, the circumstances surrounding the extended negotiations entered into between the parties, since the enactment of the legislation, attempted to resolve legitimate differences. The cumbersome procedures pursued by the government do not represent bad faith, but merely the usual administrative reactions, spawned by an overly intrusive bureaucracy, to perhaps misguided but certainly benign, congressional policies.

Accordingly,

ORDER

IT IS ORDERED that defendants' motion for reconsideration of the order of this Court dated August 28, 1987, denying attorneys' fees, is DENIED.

Entered this 2nd day of November, 1987.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Supreme Court, U.S.
FILED
MAR 18 1991
OFFICE OF THE CLERK

No. 90-1080

In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the position of the United States in a condemnation action was "substantially justified" under the Equal Access to Justice Act, 28 U.S.C. 2412 (d)(1)(A), when the United States used an experienced, qualified appraiser who used comparable properties as the basis for his appraisal, the United States reasonably relied on that appraisal, and there was no evidence of bad faith by the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1080

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 910 F.2d 439. The opinion of the district court (Pet. App. 13-21) and the memorandum and order of the district court on petitioners' motion for reconsideration (Pet. App. 24-27) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12) was entered on August 15, 1990. A petition for rehearing was denied on October 4, 1990. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Access to Justice Act (EAJA) requires, *inter alia*, that "fees" be awarded to a "prevailing party" in civil litigation brought by the United States, "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). This case arises out of an EAJA attorneys' fees claim by petitioners. In 1977, the United States, on behalf of the National Park Service, sought to acquire petitioners' property in Polk County, Wisconsin, for inclusion in the St. Croix National Scenic Riverway. Following nearly a decade of offers and counter-offers between the Park Service and petitioners, the United States brought a condemnation proceeding. Trial was held on the issue of just compensation. The jury returned a verdict of $170,000. After the United States paid that amount, petitioners sought attorneys' fees under EAJA. The district court and court of appeals held that the position of the United States had been "substantially justified" and denied attorneys' fees. Pet. App. 2-4; see also *id.* at 14-16.

1. The district court recounted the lengthy dealings between the United States and petitioners. Petitioners' property consisted of approximately 139.5 wooded and waterfront acres, divided into two parcels. In 1977, the United States offered $38,000 for a fee interest in petitioners' first parcel and $24,000 for a scenic easement in the second. Petitioners rejected both. Nearly two years later, the United States offered $83,400 for a fee interest in the first parcel and $9,600 for a scenic easement in the second. Petitioners rejected that also. In May of 1986, the United States made another offer. It offered to pay $70,000 for a fee interest or $38,500 for a riverfront easement in the first parcel and $2,500 for a scenic

easement in the second. This too was rejected. Pet. App. 14-15.

The person employed by the United States to appraise the property prior to its May 1986 offer was Everett Strand. Pet. App. 15. Strand's appraisal was based on a study he had conducted two years earlier. *Ibid.* That study used a "market" ("comparable") approach to valuation, which "compares similar property to determine the condemned parcel's value." *Id.* at 3. The appraisal did not specifically include comparable sales, if any, along the St. Croix River. *Id.* at 15.

Throughout the nine years when the United States was making those offers, petitioners never "allowed an appraiser retained by the government to visit the premises for an on-site inspection." Pet. App. 4 n.3, 15. In October 1986, Strand was finally allowed access to petitioners' property. *Id.* at 20. After inspecting it, again employing the "market" approach, Strand gave it a value of $126,000 before taking and $107,000 after taking ($19,000 appraised value). *Id.* at 15, 18. Strand attributed the lower value of this latest appraisal to the depressed economy in Polk County. *Ibid.* Although he did not use comparables along the St. Croix River (*ibid.*), he did base his appraisal on "wooded areas and waterfront property" comparable to petitioners' property. *Id.* at 20.

Petitioners employed Peter Patchin to appraise their property. Patchin estimated a before-taking value of approximately $307,000 and an after taking value of $152,000 ($155,000 appraised value). Pet. App. 15. He used the "development" method of appraisal, which involves speculation as to "the value of the land * * * if it were eventually developed." *Id.* at 3. Petitioners, however, did not advise the

United States of Patchin's appraisal "until shortly before trial." *Id.* at 16, 20.

Prior to trial, the district court ruled that the taking by the United States was "justified." Pet. App. 16. The jury heard testimony on "damages" from the United States and from the landowner, petitioner Francis Bradac. Mr. Bradac testified that damages were at least $280,000. *Ibid.* The jury returned a just compensation verdict of $170,000, based on a before taking value of $307,000 and an after taking value of $137,000. *Ibid.*

2. Following the trial and payment of the $170,000 judgment by the United States, petitioners sought attorneys' fees from the United States under EAJA Section 2412(d)(1)(A), 28 U.S.C. 2412(d)(1)(A). Pet. App. 16. The district court found that petitioners were the "prevailing" parties under EAJA (Pet. App. 18), and proceeded to examine whether the position of the United States had been "substantially justified." The court employed the Eighth Circuit standard as articulated in *United States* v. *1,378.65 Acres of Land (Vernon County)*, 794 F.2d 1313 (1986). There the Eighth Circuit stated:

> [w]hen in a condemnation action, the Government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offers of just compensation, without any evidence of bad faith on its part, its course of conduct is solid, well founded, and clearly reasonable. Its position, therefore, is substantially justified.

Id. at 1319.

Under the *Vernon County* standard, the district court first found Strand to be an "experienced, quali-

fied and competent appraiser." Pet. App. 19. Second, the court found that the United States, in its pretrial negotiations and at trial, relied on Strand's appraisals. *Ibid.* Strand's October 1986 appraisal was lower than his May 1986 appraisal because, by October, market conditions in the area had become depressed. *Ibid.* Moreover, only in October 1986 was he "finally" allowed to visit petitioners' land. *Id.* at 20. The court noted that in his appraisal Strand had used "wooded areas and waterfront property" that were comparable to petitioners' own acreage, although Strand's comparables were not along the St. Croix River. *Id.* at 15.

Third, there was no evidence of bad faith by the United States. Indeed, "until shortly before trial," the United States had no reason to think that it might not be substantially justified in relying on Strand's appraisal, for not until that late date did petitioners even inform the United States of Patchin's valuation. Pet. App. 20. The United States also "reasonably rejected" Patchin's "development" appraisal since Strand believed that the market could not support the development proposed by petitioners. *Ibid.* Therefore, with *Vernon County* satisfied in all three respects, the district court ruled that the position of the United States was "substantially justified" and that petitioners were not entitled to recover attorneys' fees under EAJA.

3. The district court ruling was affirmed by a divided panel of the Seventh Circuit. The majority followed *Vernon County*. Pet. App. 8. The Court held that Strand was "experienced, qualified and competent." *Id.* at 7. The United States relied on his appraisals to formulate its offers. *Id.* at 7-8. And there was "no showing of bad faith" by the United

States. *Id.* at 8. Rather, the court found that its "review of the record * * * shows a history of good faith settlement offers by the United States." *Ibid.*

The court found that Strand's use of comparable wooded and waterfront property not actually in the St. Croix River area was "puzzl[ing]" (Pet. App. 8), but of no legal significance. The court ventured that obtaining comparables in that area was "perhaps" due to the fact that "no privately sold riverfront property existed locally, as it had been or was in the process of being acquired by the government for the National Park." *Id.* at 3. Nor did any "legal authority" require that Strand employ the "development" appraisal method over the "market" approach. *Id.* at 8. In conclusion, the court held that the district court did not abuse its discretion when it found that "the Government selected an experienced, qualified appraiser in Mr. Strand, and that it consistently relied on Strand's appraisals of the [petitioners'] property in its offers of just compensation." *Id.* at 9.

Judge Pell, in dissent, agreed that *Vernon County* was the "guiding star" here. Pet. App. 10. Nor did he take issue with the findings of the district court as to Strand's experience and qualifications, the method of valuation he employed, or the extent to which his appraisal used genuinely comparable properties. Rather, he believed that the district court had denied petitioners sufficient opportunity to prove their claims of government bad faith. *Ibid.* Judge Pell therefore would have vacated the district court ruling and remanded for an evidentiary hearing on the issue of bad faith. *Id.* at 11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Nor does the question presented by this case—whether the actions taken by the United States in acquiring petitioners' land were "substantially justified" under EAJA—raise any issue of national importance. Accordingly, further review is not warranted.

1. According to petitioners, the court of appeals ruled that the United States need "only" show that its offer was based on the appraisal of an experienced, qualified appraiser—and the appraisal need not have even been "done in the proper manner"—in order to demonstrate that its position in a condemnation case is "substantially justified." Pet. 7. Petitioner's interpretation of the court of appeals' decision is mistaken.

a. First, *Vernon County* established a three-part test for determining whether the conduct of the United States in a condemnation case is "substantially justified" under EAJA. 28 U.S.C. 2412 (d)(1)(A). The United States must: (1) select "experienced, qualified, competent appraisers"; (2) "consistently rel[y]" on their evaluations; and (3) there must be no evidence of "bad faith" by the United States. *Vernon County*, 794 F.2d at 1319; Pet. App. 7. *Vernon County*—as decided by the Eighth Circuit and as applied by the Seventh Circuit in this case [1]—plainly requires more for a "substantially justified" government position than "only" reliance on "experienced, qualified, competent apprais-

[1] *Vernon County* has also been adopted by the Fourth Circuit in *United States* v. *312.50 Acres of Land*, 851 F.2d 117, 119 (1988).

ers." Lack of government bad faith is also an indispensable element.[2]

b. Second, petitioners' argument (Pet. 12-13) that the government's position was not substantially justified because the appraisals in this case improperly compared the condemned property with properties not located in the St. Croix River Valley is also mistaken. Traditional tests of comparability do not turn on physical closeness of the comparable property to the subject property. "Similarity of character and locality depends not upon mere propinquity." *United States* v. *124.84 Acres of Land, Warrick County, Indiana*, 387 F.2d 912, 915 (7th Cir. 1968), citing *Knollman* v. *United States*, 214 F.2d 106, 109 (6th Cir. 1954); *United States* v. *American Pumice Co.*, 404 F.2d 336, 336-337 (9th Cir. 1968) ("There may be cases where quite distant properties can be shown to be comparable in an economic or market sense.").

In light of the principle that comparable properties need not be in close physical proximity to the condemned property, the district court found that Strand "used comparables containing both wooded areas and waterfront property" (Pet. App. 20), and

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[2] Similarly, petitioners err in asserting that the court of appeals "deviated" (Pet. 9) from this Court's holding in *Pierce* v. *Underwood*, 487 U.S. 552, 566 (1988), that to be "substantially justified" means more than to be simply "undeserving of sanctions for frivolousness." Petitioners argue that the court of appeals required that the government "merely * * * assert[]" lack of bad faith—a standard that petitioners believe to be tantamount to "frivolousness"—in order to show substantial justification. Pet. 11. Yet the court of appeals quite plainly analyzed the case in terms of all three *Vernon County* factors, not merely lack of bad faith.

the Seventh Circuit noted that both of Strand's appraisals "utilized comparable parcels in his analysis." [3] *Id.* at 8. The factual finding of both courts below that comparable properties were used in the appraisals is entitled to great weight in this Court.[4] See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (citing cases). In any event, such a finding would not warrant further review.

2. Petitioners also contend that the court of appeals has broken with the "substantial justification" standards in "at least" two other circuits. Pet. 14. Petitioners concede, however, that the "substantial justification" standards in the two circuits they identify simply require broad "totality of the circumstances" inquiries. Pet. 15 n.18.[5] Petitioners do not

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[3] As the quotation in text demonstrates, petitioners misstate the court of appeals' opinion when they assert that "[t]he Seventh Circuit openly admitted that 'comparable parcels' were not used by the U.S. Government." Pet. 15.

[4] Petitioners assert (Pet. 12) that the court of appeals' decision actually conflicts with the Eighth Circuit's decision in *Vernon County* because the Seventh Circuit allegedly "abandoned" *Vernon County*'s "factual predicate" that "similar plots of land" must be compared in making an appraisal. That assertion is mistaken. First, the court of appeals in this case found that Strand's appraisal did compare similar plots of land. Second, the phrase "similar plots of land" in *Vernon County* appears in the Eighth Circuit's recitation of the facts of that case and cannot be read to incorporate petitioners' suggested rule requiring close geographic proximity of comparable properties. See *Vernon County*, 794 F.2d at 1315. As did the Seventh Circuit here, the Eighth Circuit in *Vernon County* eschewed any rigid rule for determining when two properties are comparable, noting that an appraisal is a "peculiarly technical factual determination" and "more an art than a science." *Id.* at 1318.

[5] See *United States* v. *Charles Gyurman Land & Cattle Co.*, 836 F.2d 480, 485 (10th Cir. 1987) ("totality of the circum-

explain how standards of such breadth are undermined by the court of appeals' decision here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

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stances" determines whether position of United States substantially justified); *United States* v. *640.00 Acres of Land*, 756 F.2d 842, 849 (11th Cir. 1985) ("substantially justified" standard "essentially one of reasonableness").

[6] Petitioners appear to introduce yet another obligation incumbent on the United States by charging that the court of appeals did not make a separate finding that Mr. Strand was "neutral and impartial." Pet. 15. *Vernon County* does not require this separate inquiry, and the findings of both courts below that Strand was "qualified and competent" (Pet. App. 7, 9, 19) put to rest any suggestion that his objectivity was in doubt.

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No. 90-1080

In The

Supreme Court of the United States

October Term, 1990

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Respondent has failed to rebut effectively the grounds set forth by Petitioners as to why this Honorable Court should grant *certiorari* in this case. Respondent's Brief In Opposition either ignores those grounds with the hope that they will go away, or seeks to obscure them with the hope that they will be overlooked.

However, those grounds will not go away and they will not be overlooked. They provide ample and abundant authority for this Honorable Court to grant *certiorari*.

ARGUMENT

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Honorable Court.

Respondent ignores the argument advanced by Petitioners as to the national significance of the issue presented by this matter – a significance that provides ample and abundant authority for the granting of *certiorari*. Respondent apparently hopes that the overriding importance of this issue will go away. Unfortunately for thousands of Americans, it will not go away.

In the 1991 budget passed by Congress on October 27, 1990, four federal agencies were given $301.1 million to buy and to condemn privately-owned lands during 1991.[1] The 1991 budget represents a dramatic increase for each of those four agencies.[2] These land acquisition funds will be expended in 43 states and the District of

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[1] The agencies are the National Park Service, the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the Bureau of Land Management.

[2] The increase over the 1990 budget represented by the 1991 budget for each of the four agencies is as follows:

National Park Service: 53.6%
U.S. Fish and Wildlife Service: 36.7%
U.S. Forest Service: 40.5%
Bureau of Land Management: 24.6%

Columbia. This aggressive approach to land acquisition is likely to continue into the future. President Bush's Fiscal Year 1992 budget proposes the largest land acquisition budget in the history of the U.S. Forest Service and the Bureau of Land Management.[3]

Petitioners respectfully maintain that the staggering size of the federal budget for land acquisition and the increasing number of programs which provide for such acquisitions underscore and dramatize the importance of this issue. Increasing numbers of Americans will become involved in "negotiations" with the U.S. Government over the "value" of their property. When those negotiations break down, condemnation and litigation over the value of their property will be the result. When landowners prevail over the U.S. Government – not in regaining their land but in receiving proper payment for that land – the payment received should not be diminished by the fees incurred by the landowner to protect his or her interests against the U.S. Government. That is the state of the law. Under the Equal Access to Justice Act,[4] when the position taken by the U.S. Government is not "substantially justified," the U.S. Government must pay for attorney and expert fees.

It is respectfully submitted that sound public policy requires the adoption by this Honorable Court of a

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[3] The Bureau of Land Management land acquisition budget is proposed to increase to $47.5 million – a startling 204% jump from even 1991's dramatic increase. The U.S. Forest Service land acquisition budget is proposed to increase to $123.1 million – a 38% increase from 1991's rise.

[4] 28 U.S.C. § 2412(d)(1)(A)

uniform standard to be applied by the circuits in determining what constitutes "substantial justification" in land acquisition "negotiations" and subsequent condemnation proceedings. Yet while sound public policy may merit action, it is the voices of thousands of Americans which cry out for such action. For this is not simply about the ability to be compensated justly for the loss of one of our nation's most treasured liberties – the right to own property – it is about fundamental fairness.

B. A True, Direct, Intolerable and Irreconcilable Conflict Exists Between The Decision Below And The Decision Rendered By This Honorable Court.

Respondent attempts to dismiss, in a footnote, the clear conflict between a decision of this Honorable Court, *Pierce v. Underwood*, 487 U.S. 552 (1988), and the decision below. This Honorable Court has held that one need not show frivolousness in order to demonstrate that the position of the U.S. Government was not "substantially justified." The question now posed is whether "bad faith" is the same as "frivolousness" in determining whether the U.S. Government's position was "substantially justified." Petitioners respectfully submit that the two are fundamentally the same and an applicant for funds under the Equal Access to Justice Act need not demonstrate "bad faith" anymore than such an applicant would need to demonstrate "frivolousness" to receive an award.

Unfortunately, in this instant case we will not know whether the use by the Seventh Circuit of some touchstone besides "bad faith" would have resulted in a decision for the Petitioners. The Seventh Circuit, having

found that "there has been no showing of bad faith on behalf of the government" (App. at 8.), simply rejected the Bradacs' plea without further inquiry. In light of this clear disregard for the holding of *Pierce v. Underwood*, and the strong dissent of Senior Circuit Judge Pell, the petition should be granted or summary reversal ordered.

C. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between the Decision Below And The Decision Of The Eighth Circuit Court Of Appeals Upon Which That Decision Is Based.

Respondent attempts to obscure the fact that the Seventh Circuit ruled for the U.S. Government despite the failure of the U.S. Government to adhere to the rule set forth by the Eighth Circuit upon which the Seventh Circuit allegedly relied.[5] In the instant case, the Seventh Circuit acknowledged that the U.S. Government had failed to "use actual comparable parcels." (App. at 8.) "[W]e are puzzled that the Government's appraisal did not use actual comparable parcels from the St. Croix area. . . . " *Id.* The District Court found that the U.S. Government "used comparables containing both wooded areas and waterfront property, but did not use comparables from the St. Croix River." (App. at 20.)

Again, Respondent seeks to obscure the fact that the Seventh Circuit found that the U.S. Government had used

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[5] Respondent's scurrilous accusation that Petitioners misstated the opinion of the Court of Appeals will be ignored. As the text above makes clear, Petitioners have quoted and stated accurately.

"comparables" but not "actual comparables." Thus, the Seventh Circuit, while embracing a rule which compels the use of "actual comparables," concluded that the use of "comparables" was enough. That is not the rule set forth by the Eighth Circuit in *United States v. 1,378.65 Acres (Vernon County)*, 794 F.2d 1313 (8th Cir. 1986).[6]

D. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts of Appeal.

Respondent attempts to obscure the fact that the circuits have adopted different and conflicting standards as to what constitutes "substantial justification." With reference to the "totality of the circumstances" standard, Respondent argues that "[p]etitioners do not explain how standards of such breadth are undermined by the court of appeals' decision here." (Brief in Opp. at 9.)

However, a careful review of *United States v. Charles Gyurman Land & Cattle Co., et al.*, 836 F.2d 480 (10th Cir. 1987), reveals a detailed discussion of the varying factors considered by the circuits in making "substantial justification" determinations. *Id.* at 483-84. In fact, the Seventh Circuit acknowledged this conflict among the circuits, concluding that the circuits have "utiliz[ed] somewhat varied approaches and at times achiev[ed] different results." (App. at 6.) It is clear that, for the Tenth Circuit

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[6] Respondent's argument (Brief in Opp. at 9, n. 4) that the holding of the Eighth Circuit in *Vernon County* did not require the use of actual comparables is disingenuous at best.

at least, the hiring by the U.S. Government of an "experienced, qualified, and competent appraiser" – the rule set forth by the Eight Circuit – is not enough. This conflict between circuits compels resolution by this Honorable Court.

Respondent also attempts, in a footnote (Brief in Opp. at 10, n. 6.) to obscure Petitioners' argument that the Seventh Circuit is in conflict with other circuits by its failure to determine whether the government's expert was "neutral and impartial." Respondent is correct that *Vernon County* did not require this separate inquiry. However, Respondent is in error in its assertion – without authority – that a finding that the U.S. Government's expert was "qualified and competent" thereby would "put to rest any suggestion that his objectivity was in doubt." (Brief in Opp. at 10, n. 6.) The fact that an individual is "qualified and competent" does not mean *a priori* that same individual is "neutral and impartial." Respondent's assertion to the contrary must fail.

Respondent is further in error for its failure to recognize that the requirement for a "neutral and impartial expert" was established by the Eleventh Circuit in *United States v. 640 Acres (Dade County)*, 756 F.2d 842 (11th Cir. 1985). In fact, the Eleventh Circuit made it clear that, in determining whether the position of the U.S. Government was "substantially justified," it demands "a neutral and impartial expert" not "one regularly employed by the government." *Id.* at 850. What is obvious from this discussion which Respondent seeks to obscure is that there exists a true, direct, intolerable and irreconcilable conflict among the circuits which compels resolution by this Honorable Court.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition, a *writ* of *certiorari* should be granted.

Respectfully submitted,

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